

# San Francisco Bay Conservation and Development Commission

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Marina Village Associates, LLC  
1999 Avenue of the Stars, Suite 2850  
Los Angeles, CA 90067

STIPULATED CEASE  
AND DESIST AND  
CIVIL PENALTY ORDER  
NO. CCD 2016.04

Effective Date: November 3, 2016

The San Francisco Bay Conservations and Development Commission ("BCDC" or "Commission") and Marina Village Associates, LLC ("MVA") enter into this Stipulated Cease and Desist and Civil Penalty Order ("Order"), and the Commission issues the Order pursuant to Government Code Sections 66638 and 66641.6. The Commission and MVA are collectively referred to as "Parties." MVA is sometime referred to as "Permittee."

## I. FINDINGS

- A. BCDC Permit No. 2006.010.03, as amended through September 2, 2015 ("the Permit", issued to MVA, authorizes certain development activities in the Bay and within the shoreline band at the Loch Lomond Marina located at 110 Loch Lomond Drive in the City of San Rafael, Marin County, including but not limited to: the placement of rock riprap for shoreline protections; construction of a floating kayak dock; construction of a portion of eight residential units; construction of a new boat repair facility and parking area; development and improvement of public access areas along the shoreline; and construction and enhancement of seasonal wetlands.
- B. On March 14, 2015, Adrienne Klein, BCDC Chief of Enforcement, conducted a site visit and observed that MVA had placed rock riprap adjacent to and bayward of the Boardwalk, and that some unknown and probably upland activity had caused a roughly 8,280-square-foot mud wave on the edge of the Bay west of the East Spit between Docks E and F, which had smothered an area of tidal marsh habitat of the same size. Ms. Klein further observed that the slope of the riprap appeared to exceed a 2:1 slope, which she believed was not consistent with the requirements of Permit Special Condition II.Q.2 (Riprap Placement), and questioned whether the base of the riprap had been placed in the Bay because of the presence of marsh vegetation at the toe of the slope and growing up through the riprap, in violation of Authorization Section I.A.2.i of the Permit.
- C. Following the March 14, 2015 site visit, BCDC staff reviewed the Permit file and commenced an enforcement investigation to assess MVA's compliance with the terms and conditions of the Permit. Between March 20 and October 20, 2015, BCDC staff's

investigation included numerous communications with MVA's then-authorized representative, Todd Wright, by email and letters, in telephone conversations and meetings at BCDC's office, and at a second site visit.

- D. On November 20, 2015, BCDC staff sent MVA a letter that summarized the alleged violations of the Permit and McAteer-Petris Act and included proposed resolutions with a proposed settlement agreement attached. On November 25, 2015, Mr. Wright sent BCDC staff a letter confirming receipt of BCDC's November 20<sup>th</sup> correspondence and stating that the letter would be forwarded to MVA "who will respond to you directly." On January 7, 2016, BCDC staff emailed Mr. Wright (and mailed a copy of the email to John Arvin at MVA) stating that in the absence of any effort by MVA to resolve this matter through the proposed settlement agreement, BCDC intended to prepare a complaint for administrative civil penalties and a cease and desist order. On January 14, 2016, Mr. Wright responded to the January 7<sup>th</sup> email by directing BCDC staff to address any correspondence regarding the issue of BCDC's November 20, 2015 letter to Mr. Arvin with a copy to Mr. Wright.
- E. On May 20, 2016, the Executive Director commenced a formal enforcement proceeding by issuing a Violation Report and Complaint for the Imposition of Administrative Civil Penalties ("Original Violation Report").
- F. On June 15, 2016, BCDC staff emailed John Arvin a copy of the Original Violation Report. Between June 10 and July 27, 2016, BCDC staff communicated with Mr. Arvin and/or MVA's counsel on a number of occasions, including at two additional site visits and a meeting at BCDC's office, regarding the alleged violations and potential resolution of the violations.
- G. On August 15, 2016, the Executive Director issued a Supplemental Violation Report and Complaint for the Imposition of Administrative Civil Penalties ("Supplemental Violation Report"). The Supplemental Violation Report eliminated two of the original alleged violations, modified the scope of one of the other original alleged violations, and provided notice of seven additional alleged violations that had occurred, or that BCDC staff had become aware of, since May 20, 2016.
- H. In summary, the violations of the Permit or the McAteer-Petris Act alleged by the Executive Director, in the Original Violation Report and as modified and supplemented by the Supplemental Violation Report, include the following:
  - 1. The placement of riprap adjacent to the Boardwalk:
    - a. In the Bay, in violation of Authorization Section I.A.2.i of the Permit, which authorizes only the placement of riprap in the shoreline band.
    - b. At a slope steeper than the authorized 2:1 grade that was not engineered in violation of Permit Special Condition II.Q.2, Riprap Placement.
    - c. Without plan approval in violation of Permit Special Condition II.Q.3.b, Riprap Plan Review.

2. The unauthorized stockpiling of construction materials in the shoreline band located between Docks E and F that caused a mudwave that resulted in unauthorized fill in violation of Section 66632(a) of the McAteer-Petris Act and Permit Special Condition II.A.3, Conformity with Final Approved Plan. The mudwave's dimension observed by staff is roughly 8,280 square feet.
3. The unauthorized work in the Bay and shoreline band to repair the seawall, Boardwalk, and riprap destroyed by the mudwave, located between Docks E and F in violation of Section 66632(a) of the McAteer-Petris Act and Permit Special Condition II.A.3, Conformity with Final Approved Plans. Staff estimated the dimension of the repaired area of bay and shoreline band to be roughly 12,650 square feet.
4. The unauthorized placement of riprap in the Bay and shoreline band at Lot D, located on the East Spit in violation of Section 66632(a) of the McAteer-Petris Act and Permit Special Condition II.A.3, Conformity with Final Approved Plans.
5. The unauthorized placement of electrical posts and associated electrical wiring in the Bay and shoreline band located adjacent to the Boardwalk in violation of Section 66632(a) of the McAteer-Petris Act and Permit Special Condition II.A.3, Conformity with Final Approved Plans.
6. The unauthorized placement of the following utilities in the dedicated public access area located in the shoreline band in violation of Section 66632(a) of the McAteer-Petris Act and Permit Special Condition II.A.3, Conformity with Final Approved Plans:
  - a. A transformer located on the landward end of the East Spit;
  - b. A "T shaped" metal pole located on the landward end of the East Spit;
  - c. A switch gear cabinet (referred to as a "storage locker" in the Original and Supplemental Violation Reports) and unauthorized concrete foundation pad upon which the switch gear cabinet sits, at the eastern landward edge of the East Spit, which extends beyond the built edge of the spit and may be located in the Bay;
  - d. A transformer located at the southeast angle bayward of the east parking lot adjacent to the start of the breakwater trail; and
  - e. Electrical equipment located at the southeast angle bayward of the east parking lot adjacent to the start of the breakwater trail
7. Failure to submit to the Executive Director, gain staff approval of, and record, an instrument that dedicates the required public access area to the public by March 31, 2016, in violation of Permit Special Condition II.B.2, Permanent Guarantee of Public Access.
8. Failure to submit to the Executive Director and gain staff approval of an instrument that dedicates the required view corridors by March 31, 2016, in violation of Permit Special Condition II.C.2, Permanent Guarantee of View Corridors.

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9. Failure to submit written certification of contractor review prior to commencing any grading, demolition, or construction, in violation of Permit Special Condition II.E, Certification of Contractor Review. (This violation was resolved May 13, 2015.)
10. Failure to record the amended Permit on all parcels affected by the Permit with Marin County within 30 days after execution of amended Permit, in violation of Permit Special Condition II.P, Recording. (This violation was resolved April 14, 2016.)
11. The failure to provide and make available for public access use by March 31, 2016:
  - a. A 340-foot-long, 57-foot-wide park, picnic area, benches, children's playground, and a five-foot-wide, 400-foot-long decomposed granite trail on the East Spit;
  - b. A public restroom at the entrance of the East Spit; and
  - c. A fishing pole holder at the eastern end of the marina,All in violation of Permit Special Condition II.B.5.g, h, and k, The Backbone.
12. The failure to provide and make available for public access use, a striped pathway on existing asphalt to connect the park located on the West Spit to the existing public access located on the adjacent property prior to March 1, 2016, in violation of Permit Special Condition II.B.11.a, Future Public Access Connections to Neighboring Parcel.
13. Establishing, pursuant to covenants, conditions and restrictions ("CC&Rs"), two membership associations intended to have responsibility to maintain all the public access and view corridor improvements and landscaping without including in the CC&Rs for each association certain required information and assurances, in violation of Permit Special Condition II.O.4, Property Owners Association.
14. The unauthorized placement of riprap possibly in the Bay and in the shoreline band at the northeastern edge of the East Spit, adjacent to the unauthorized switch gear cabinet located on the landward end of the east spit in violation of Section 66632(a) of the McAteer-Petris Act and Permit Special Condition II.A.3, Conformity with Final Approved Plans.
15. The failure to maintain from flooding the public access area located in between the east parking area and the head of the breakwater trail, adjacent to the wetland mitigation site, in violation of Permit Special Condition II.B.9, Public Access Maintenance.
- I. On August 16, 2016, BCDC staff met with representatives of MVA and MVA's counsel at BCDC office to discuss the Supplemental Violation Report and potential resolution of the violations. Additional settlement discussions between MVA's counsel and BCDC staff occurred following the August 16<sup>th</sup> meeting.

- J. On September 13, 2016, the Parties agreed to a settlement in principle on the terms of this Order, subject to review and approval of this Order by the Commission's Enforcement Committee, at a public hearing, and by the Commission, at a public meeting.
- K. On October 20, 2016, the Enforcement Committee held a noticed public hearing to consider this Order and all comments pertaining to this Order. Upon the recommendation of the Enforcement Committee, the Commission considered and approved this Order at a public meeting on November 3, 2016.
- L. The Commission and MVA enter into this Order to settle the claims alleged against the MVA as summarized in Paragraph I.H, above, and described more fully in the additional findings set forth in Attachment A to this Order, which is incorporated by reference herein. The Parties consider this Order to constitute a reasonable settlement of disputed claims, which will result in full compliance with the Permit. In stipulating to this Order, MVA does not admit liability for any claim or alleged violation, or admit any fact or Commission finding, including those in Attachment A, relating to such alleged liability, except MVA agrees that the facts set forth in Paragraphs I.A through I.K, above, are true.

## **II. CEASE AND DESIST ORDER**

- A. Pursuant to California Government Code Section 66638, the Commission orders MVA, and MVA hereby agrees, to comply fully with the following conditions of this Order.
- B. On and after the Effective Date of this Order, MVA shall cease and desist from all activity in violation of the Permit.
- C. Remove unauthorized riprap in the Bay adjacent to the Boardwalk.
  - 1. By no later than November 3, 2016, MVA shall submit a survey, prepared and certified by a registered professional engineer, of the 1,100-foot section of the shoreline known as the Boardwalk, mapping the toe of the existing riprap slope (which is also the boundary between the Bay and the shoreline band).
  - 2. By no later than November 3, 2016, MVA shall establish horizontal control points at the boundary between the Bay and the shoreline band along the 1,100-section of the shoreline known as the Boardwalk, and shall submit a map, prepared and certified by a registered professional engineer, showing the location of each of the horizontal control points.
  - 3. By no later than January 31, 2017, MVA shall remove all riprap located bayward of the horizontal control points, place such removed riprap in the shoreline band or outside the Commission's jurisdiction, and submit a monitoring report to BCDC that includes photographs taken at low tide before and after the riprap removal activities.

- D. Evaluate potential mitigation for adverse impacts of the mudwave on biological resources. By no later than November 3, 2016, MVA shall submit a report, prepared by WRA Environmental Consultants, to evaluate: (a) potential mitigation measures for the adverse impacts to the biological resources in the Bay and shoreline band caused by the mudwave that occurred in 2014 bayward of the Boardwalk between Docs E and F; and (b) the extent to which said biological resources may recover from such impacts on their own, without implementation of potential mitigation measures. The report shall include cost estimates for implementing each potential mitigation measure.
- E. Remove unauthorized riprap unnecessary for shoreline protection along a portion of Lot D, which is located on the west side of the East Spit.
  - 1. By no later than November 3, 2016, MVA shall submit a report, prepared and certified by a registered professional engineer: (1) documenting the extent to which the unauthorized riprap placed along a portion of Lot D is necessary for shoreline protection; and (2) presenting a workplan, for BCDC review and approval, to remove all unauthorized riprap placed in this area that is unnecessary for shoreline protection.
  - 2. By no later than January 31, 2017, MVA shall implement the workplan, as approved and subject to any conditions imposed by BCDC, to remove all unauthorized riprap placed along Lot D that is unnecessary for shoreline protection.
- F. Remove unauthorized utilities placed temporarily in the Bay or shoreline band. By no later than November 30, 2016, MVA shall remove:
  - 1. The temporary electrical posts and associated electrical wiring in the Bay and shoreline band adjacent to the Boardwalk; and
  - 2. The "T"-shaped metal pole located on the landward end of the East Spit.

In addition, by November 11, 2016, MVA shall provide by letter a status report on its progress to remove the temporary electrical posts and associated electrical wiring in the Bay and shoreline band adjacent to the Boardwalk.
- G. Remove unauthorized riprap in the Bay or shoreline band at the northeastern edge of the East Spit. By no later than November 30, 2016, MVA shall remove the unauthorized riprap in the Bay or shoreline band at the northeastern edge of the East Spit, adjacent to the unauthorized switch gear cabinet located on the landward end of the East Spit.
- H. By no later than November 30, 2016, MVA shall submit to the Executive Director a fully complete and properly executed application to amend the Permit. The application shall include, but may not be limited to, the following:
  - 1. MVA shall request that Permit Special Condition II.Q. be amended to:
    - a. Authorize the placement of riprap adjacent to the 1,100-foot section of the shoreline known as the Boardwalk at a slope within a range no steeper than 1.5:1 (horizontal:vertical) to 2:1 (horizontal:vertical);

- b. Add a maintenance and monitoring condition to require: (a) an annual inspection of the riprap along the Boardwalk, using the horizontal control points at the boundary between the Bay and the shoreline band established pursuant to Paragraph II.C.2 of this Order (which shall be shown on a map included in the application); (b) the removal, by no later than January 31 of each year of all riprap located bayward of the horizontal control points; and (3) submission of an annual monitoring report to BCDC by no later than January 31 of each year that includes photographs taken at low tide before and after the riprap removal activities. MVA may request that the amended permit authorize the Executive Director to terminate this maintenance and monitoring condition, upon MVA's request, if the annual monitoring reports demonstrate that the riprap is stable for five continuous years.
2. MVA shall request that Permit Authorization Condition I.C. be amended to extend the date for completion of the work authorized in Amendment No. Three to July 1, 2019.
3. MVA shall request after-the-fact authorization for the placement of existing riprap along a portion of Lot D that MVA contends is necessary for shoreline protection. MVA's request shall include an analysis of the consistency of such riprap with the McAteer-Petris Act and applicable policies of the San Francisco Bay Plan.
4. MVA shall request after-the-fact authorization for the unauthorized construction activity conducted by MVA in September 2014 in the Bay and shoreline band to repair the seawall, Boardwalk, and riprap destroyed by the mudwave.
5. MVA shall request after-the-fact authorization for permanent placement of the following structures in the Bay or shoreline band:
  - a. The transformer installed on the landward end of the East Spit.
  - b. The PG&E switch gear cabinet and concrete foundation pad upon which the switch gear cabinet sits, located on the eastern landward end of the East Spit.
  - c. The transformer installed at the southeast angle bayward of the east parking lot.
  - d. The electrical equipment located at the southeast angle bayward of the east parking lot adjacent to the start of the breakwater trail.
  - e. Placement of underground utilities in the shoreline band.
6. MVA understands and agrees that if the Commission, in issuing an amended Permit, denies after-the-fact authorization, as requested in accordance with Paragraphs II.H.4, above, for any fill (including structures) placed in the Bay or shoreline band in violation of the McAteer-Petris Act or the Permit, within ninety (90) days of any such denial, MVA shall remove the unauthorized fill from BCDC's jurisdiction and dispose of the materials outside of the Commission's jurisdiction in compliance with all applicable legal requirements.

- I. No later than 30 days after the Effective Date of this Order, excluding the time period(s) during which the draft guarantee is held by staff counsel for review, MVA shall submit proof of recordation with Marin County of a legal instrument that permanently guarantees the public access areas required by Special Condition II.B.2 of the Permit.
- J. No later than 30 days after the Effective Date of this Order, excluding the time period(s) during which the draft guarantee is held by staff counsel for review, MVA shall submit proof of recordation with Marin County of a legal instrument that permanently guarantees the view corridors as required by Special Condition II.C.2 of the Permit.
- K. No later than 30 days after the Effective Date of this Order, excluding the time period(s) during which the draft covenants, conditions, and restrictions (CC&Rs) are held by staff counsel for review, MVA shall submit for review and concurrence proposed CC&Rs for each and every membership association that may in the future assume responsibility (pursuant to a BCDC-approved partial assignment of the Permit) to maintain public access improvements, including landscaping, and view corridors, to comply with the provisions specified in Permit Special Condition II.O.4.
- L. By no later than the following dates, MVA shall make available for public access use, as required by Special Condition II.B.5.g, h, and k of the Permit:

- 1. By November 3, 2016, a 340-foot-long, 57-foot-wide park, picnic area, benches, children's playground, and a five-foot-wide, 400-foot-long decomposed granite trail on the East Spit;
- 2. By November 30, 2016, a public restroom at the entrance of the East Spit; and
- 3. By November 3, 2016, a fishing pole holder at the eastern end of the marina.

In addition, by November 11, 2016, MVA shall provide by letter a status report on its progress to make available for public access use the public restroom at the entrance of the East Spit.

- M. By no later than November 3, 2016, MVA shall make available for public access use, as required by Permit Special Condition II.B.11, a striped pathway on existing asphalt to connect the park located on the West Spit to the existing public access located on adjacent property, and shall keep this area clear of all obstructions that may deter public access.
- N. By no later than April 28, 2017, MVA shall submit a report, prepared and certified by a registered professional engineer to evaluate: (1) the frequency, duration, and extent of tidal flooding and post-flooding standing water in the public access area located between the east parking lot and the head of the breakwater trail; and (2) potential alternatives to reduce tidal flooding and post-tidal standing water in this area, including but not limited to raising land elevations and redesigning public access (e.g., a boardwalk, installing culverts and/or a tide gate under the trail), to protect and ensure the usability of the public access areas and improvements. The report shall include cost estimates for implementing each potential alternative.



- O. By no later than June 30, 2017, MVA shall submit to the Executive Director a fully complete and properly executed application to amend the Permit to implement those measures proposed by MVA, based on consideration of the potential alternatives evaluated in the report prepared pursuant to Paragraph II.N, above, to reduce tidal flooding and post-flooding standing water in the public access area located between the east parking lot and the head of the breakwater trail. Upon issuance of the amended permit, MVA shall implement the measures authorized or required by the amended permit to reduce tidal flooding and post-flooding standing water in this public access area.

### **III. CIVIL PENALTY ORDER**

- A. Pursuant to California Government Code Sections 66641.5 through 66641.9, the Commission hereby assesses and orders MVA to pay a civil penalty of \$210,000, which MVA agrees to pay in settlement of this matter. This penalty payment shall constitute MVA's full and complete satisfaction of their liability for civil penalties for all alleged violations summarized in Paragraph I.H and described more fully in Attachment A, through the date of this Order.
- B. Pursuant to Government Code Section 66647, within 30 days of the Effective Date of this Order, MVA shall remit the penalty payment to the Commission by cashier's check, in the amounts of \$210,000, payable to the San Francisco Bay Conservation and Development Commission – Bay Fill Clean-Up and Abatement Fund.

### **IV. STIPULATED PENALTIES**

- A. Upon written demand by the Executive Director listing specific violations of this Order, MVA shall pay stipulated penalties in accordance with the following schedule for each failure to comply in a timely manner with the following requirements of this Order:
1. Failure to submit: (i) the survey required by Paragraph II.C.1; (ii) the map required by Paragraph II.C.2; or (iii) any of the reports required by Paragraph II.D, Paragraph IIE.1, or Paragraph N.

|                       |               |
|-----------------------|---------------|
| 1 to 7 days late:     | \$100 per day |
| 8 and more days late: | \$200 per day |
  2. Failure to: (i) remove all riprap located bayward of the horizontal control points and submit the monitoring report required by Paragraph II.C.3; (ii) complete implementation of the workplan to remove all unauthorized riprap along Lot D that is unnecessary for shoreline protection, as required by Paragraph II.E.2; (iii) remove the unauthorized utilities temporarily placed in

the shoreline band, as required by Paragraphs II.F.1 and II.F.2; (iv) remove the unauthorized riprap at the northeastern edge of the East Spit, as required by Paragraph G.

1 to 7 days late: \$250 per day

8 and more days late: \$500 per day

3. Failure to submit to the Executive Director a fully complete and properly executed application to amend the Permit, as specified in Paragraph II.H or Paragraph II.O.

1 to 7 days late: \$200 per day

8 and more days late: \$400 per day

Stipulated penalties shall not accrue under this Paragraph V.A.3 during the time period BCDC staff reviews MVA's application to amend the Permit (provided said application is submitted within the time specified in Paragraph II.H or Paragraph II.O), but shall accrue if and when the Executive Director provides notice that the application is not fully complete. If the Executive Director determines that the application is not fully complete due solely to circumstances arising from a cause beyond the control of MVA or that a delay is justifiable based on MVA's good faith efforts to comply, the Executive Director may suspend the accrual of stipulated penalties under this Paragraph V.A.3 for such period as the Executive Director determines is reasonably necessary for MVA, exercising good-faith and diligent efforts to minimize any delay, to provide the information or documentation necessary to fully complete the application.

4. Failure to submit proof of recordation by Marin County of staff-approved legal instruments that permanently guarantee: (i) the public access area required by Permit Special Condition II.B.2, as required by Paragraph II.I; and (ii) the view corridors as required by Permit Special condition II.C.2, as required by Paragraph II.J.

1 to 7 days late: \$100 per day per permanent guarantee

8 and more days late: \$200 per day per permanent guarantee

5. Failure to submit for review and concurrence, proposed CC&Rs containing the information and assurances required by Permit Special Condition II.O.4 for each and every membership association that may in the future assume

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responsibility (pursuant to a BCDC-approved partial assignment of the Permit) to maintain public access improvements, including landscaping, and view corridors, as required by Paragraph II.K.

1 to 7 days late: \$100 per day per CC&Rs  
(or per association)

8 and more days late: \$200 per day per CC&Rs  
(or per association)

6. Failure to make available for public access and use: (i) each and every public access improvement specified in Permit Special Condition II.B.5g, h, and k, as required by Paragraphs II.L.1, II.L.2 and II.L.3; and (ii) a striped pathway on existing asphalt to connect the park located on the West Spit to the existing public access on adjacent property, as specified in Permit Special Condition II.B.11, as required by Paragraph II.M.

1 to 7 days late: \$100 per day

8 and more days late: \$200 per day

- B. MVA shall pay stipulated penalties, upon written demand by the Executive Director, by cashier's check payable to the San Francisco Bay Conservation and Development Commission Bay Fill Clean-Up and Abatement Fund, no later than 30 days after receipt of such demand. Payment of stipulated penalties shall not relieve MVA of any other obligation or liability to comply with the requirements of this Order or the Permit, except that payment of stipulated penalties shall constitute full and complete satisfaction of MVA's liability for civil penalties for the violation giving rise to the penalty.
- C. If the Executive Director demands stipulated penalties in the amounts stated above for any delay in compliance, MVA hereby waives the right to seek judicial review of their liability for such stipulated penalties.
- D. If MVA fails to comply with any of the above-referenced requirements of Paragraph II.C through Paragraph II.O for 30 or more days, the Commission reserves the right to request that the Attorney General petition the superior court for the issuance of a preliminary or permanent injunction, or both, to compel immediate compliance with this Order and for the imposition of civil penalties for any violations of this Order. In determining appropriate civil penalties, the court shall take into consideration all relevant circumstances, in accordance with Government Code Section 66641(b), and shall not apply the stipulated penalties specified in Section IV of the Order, which are intended solely for the purpose of providing an expeditious procedure for securing timely compliance with this Order as an alternative to the remedies provided by the

statute. If the Commission files a court action to seek penalties greater than the amounts stated herein, for any delay in compliance of 30 or more days, MVA reserves the right to seek judicial review of their liability for such penalties.

**V. EXTENSION OF TIME**

- A. If MVA believes that an event arising from causes beyond the control of MVA, or its contractors or agents has occurred that will delay timely compliance with any provision of Paragraphs II.C through Paragraph II.O and justifies an extension of a compliance date set forth herein, MVA shall notify BCDC staff by e-mail within 5 business days of when MVA first knew of the event. The e-mail notice shall describe the cause or causes of the delay, the anticipated length of time the delay may persist, the measures taken or to be taken by MVA to prevent or minimize the delay, the schedule by which these measures will be implemented, and the additional time requested to comply.
- B. The Executive Director may grant an appropriate extension of time to comply with any provision of Paragraphs II.C through Paragraph II.O, in response to a request made by MVA pursuant to Paragraph V.A, for good cause shown. If the Executive Director grants an extension of time, MVA shall be excused from liability for any stipulated penalties associated with the delay or impediment to performance.

**VI. ADDITIONAL TERMS**

- A. **Notice.** All notices required or desired to be sent pursuant to this Order shall be provided to:

**For the Commission:**

Maggie Weber, (415) 352-3668, [maggie.weber@bcdca.gov](mailto:maggie.weber@bcdca.gov)  
Marc Zeppetello, (415) 352-3655, [marc.zeppetello@bcdca.gov](mailto:marc.zeppetello@bcdca.gov)  
San Francisco Bay Conservation and Development Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102

**For MVA:**

Daryl Cruser, (310) 824-2200, [daryl@woodridgecapital.com](mailto:daryl@woodridgecapital.com)  
Marina Village Associate, LLC  
1999 Avenue of the Stars, Suite 2850  
Los Angeles, CA 90067

with a copy to:

James Burroughs (415) 273-7482, [jbroughs@allenmatkins.com](mailto:jbroughs@allenmatkins.com)  
Allen Matkins Leck Gamble Mallory & Natsis, LLP  
Embarcadero Center, 12<sup>th</sup> Floor  
San Francisco, CA 94111

- B. **Release.** This Order shall constitute a full settlement of the violations summarized in Paragraph I.H, and described in the additional findings set forth in Attachment A, through the date of this Order and a full release from further penalties with respect to such violations, but does not limit the Commission from taking appropriate enforcement action concerning other or future violations.
- C. **Expiration.** This Order shall expire 30 days after MVA has: (a) complied fully with the requirements of Paragraphs II.C through Paragraph II.O; (b) paid all civil penalties due pursuant to Paragraphs III.A and III.B; and (c) paid all stipulated penalties demanded by the Executive Director pursuant to Paragraphs IV.A and IV.B.
- D. **Waiver.** MVA hereby waives its right to seek judicial review of this Order.
- E. **Binding Effect.** This Order shall apply to and be binding upon: (1) the Commission, its Executive Director, and staff; and (2) MVA and its officers, directors, employees and agents.
- F. **Disclaimer of Effect of Order on Private Rights or Laws and Regulations of Other Public Bodies.** This Order shall have no effect on any duties, rights, or obligations established by private agreement or by the laws and regulations of other governmental bodies.
- G. **Disclaimer of Recognition of Property Rights.** This order shall not constitute any recognition of property rights.
- H. **Strict Compliance Obligation and Possible Court Action For Noncompliance.** Strict compliance with this Order is required. Pursuant to the McAteer-Petris Act Sections 66640 and 66641.7(b), failure to comply with the terms of this Order or to pay all applicable administrative civil penalties may result in the Commission filing a lawsuit against MVA. Pursuant to the McAteer-Petris Act, Section 66641, any person who intentionally or negligently violates a Commission cease and desist order may be liable civilly for up to \$6,000 for each day in which such violation persists. Prior to filing any lawsuit under this Section, the Commission will meet and confer with MVA with the goal of resolving any alleged violation and avoiding litigation.

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FOR THE SAN FRANCISCO BAY CONSERVATION  
AND DEVELOPMENT COMMISSION

Dated: \_\_\_\_\_

\_\_\_\_\_  
LAWRENCE J. GOLDZBAND  
Executive Director

FOR MARINA VILLAGE ASSOCIATES, LLC.  
A Delaware Limited Liability Company

Dated: 10/05/2016



\_\_\_\_\_  
RICK ARAMBULO  
Authorized Signatory

## **ATTACHMENT A – ADDITIONAL FINDINGS**

### **STIPULATED CEASE AND DESIST AND CIVIL PENALTY ORDER**

#### **NO. CCD 2016.04**

In support of, and as the basis for, Stipulated Cease and Desist and Civil Penalty Order No. CCD 2014.04 (“Order”), the Commission hereby finds:

1. The administrative record for this Order includes the relevant Commission permit and enforcement files (BCDC Permit File No. 2006.010.03; BCDC Permit File No. M2000.05.04; Enforcement File No. ER2015.019). The administrative record also includes:
  - A. Violation Report and Complaint for the Imposition of Administrative Civil Penalties, dated May 20, 2016.
  - B. Supplemental Violation Report and Complaint for the Imposition of Administrative Civil Penalties, dated August 15, 2016.
  - C. October 7, 2016, Staff Recommended Enforcement Decision Regarding Proposed Stipulated Cease and Desist and Civil Penalty Order No. CDO 2016.04.
2. On April 17, 2001, the Commission issued BCDC Permit No. M2000.005.00 (“2000 Minor Permit”) to San Rafael Marina, LLC for after-the-fact authorization to:
  - A. Upgrade a pre-existing marina’s docks and piers/gangways;
  - B. Install, use and maintain six gatehouses, two covered boat docks, a concrete sidewalk;
  - C. Place and maintain approximately 30 cubic yards or riprap along the concrete sidewalk (what is now the Boardwalk) for shoreline protection; and
  - D. Various public access amenities that have been superseded by issuance of BCDC Permit No. 2006.010.03 (“the Permit”) in 2007.
3. Prior to the issuance of the Permit in 2007, the 2000 Minor Permit was amended three times:
  - A. The first amendment was issued on June 14, 2002 to authorize a time extension for the completion of the work authorized in the original permit; the new work completion date was extended to December 1, 2002.
  - B. The second amendment was issued on December 19, 2002 to authorize a time extension for the amended work completion date; the new work completion date was extended to May 1, 2003.
  - C. The third amendment was issued on December 13, 2005 to authorize the removal and replacement of two covered boat berths and two associated finger piers that were destroyed in a November 22, 2005 fire at the marina with a work completion date of December 31, 2006.

4. On September 27, 2007, the Commission issued the Permit to San Rafael Marina, LLC to:
  - A. Place 21,600 square-feet of rock riprap for shoreline protection in the Bay along the 2,400-foot-long Breakwater;
  - B. Construct an approximately 200-square-foot floating kayak dock;
  - C. Construct a portion of eight residential units (out of a total of 82 new residences, 74 of which are out of BCDC's jurisdiction);
  - D. Construct a portion of a grocery building;
  - E. Construct a café with outdoor dining at an existing yacht club;
  - F. Construct a new boat repair facility and parking area;
  - G. Develop in phases an approximately 122,674 square-foot public access area along 4,470 feet of shoreline including a community plaza, marina green, boardwalk, and park;
  - H. Improve an existing 12,000 square-foot public access area;
  - I. Construct an approximately .22 acre seasonal wetland; and
  - J. Enhancement of an existing 1.6 acres seasonal wetland.

Relevant Special Conditions of the Permit that are the subject of this Order include:

- A. Special Condition II.A.2, Plan Review, requires that no work shall be commenced until final plans including but not limited to engineering, architectural, grading, and landscaping, are submitted to, reviewed, and approved in writing by or on behalf of the Commission.
- B. Special Condition II.A.3, Conformity with Final Approved Plans, requires all work, improvements, and uses shall conform to the final approved plans.
- C. Special Condition II.B.2, Public Access Permanent Guarantee, requires by March 31, 2016, the permittee shall, by instrument or instruments acceptable to counsel for the Commission, dedicate to a public agency or otherwise permanently guarantee such rights to the public for the required public access area as generally shown on Exhibit A of the Permit.
- D. Special Condition II.B.5, The Backbone, requires by March 31, 2016, certain improvements be completed and available for public use including (as relevant to the Order): (g) a park, picnic area, benches, children's playground, and trail located on East Spit; (h) a public restroom on East Spit; and (k) a fishing pole holder on the eastern end of the marina.
- E. Special Condition II.B.9, Public Access Maintenance, requires repairs to any public access areas or improvements that are damaged by future flooding.



- F. Special Condition II.B.11, Future Public Access Connections to Neighboring Parcel, requires by March 1, 2016, a temporary striped pathway connection on existing asphalt to connect the park area located on the West Spit to the neighboring public access.
  - G. Special Condition II.O.4, Property Owners Association, requires covenants, conditions, and restrictions ("CC&Rs") for any membership association intended to have responsibility to maintain public access and view corridor improvements to contain certain required information and assurances on or before March 25, 2016.
  - H. Special Condition II.C.2, Permanent Guarantee of View Corridor, requires by March 31, 2016, the permittees shall submit to the Commission's Executive Director and gain staff approval of an instrument that dedicates the required view corridors.
  - I. Special Condition II.Q.2, Riprap Placement, requires riprap material to be placed at a slope not steeper than a 2:1 grade.
  - J. Special Condition II.Q.3.b, Riprap Plan Review, requires plan approval on behalf of the Commission prior to the placement of riprap.
5. The Permit was executed on October 18, 2007 and recorded on title on October 17, 2007.
  6. On July 29, 2010, the Commission issued the fourth amendment to 2000 Minor Permit to San Rafael Marina, LLC to authorize the placement of rock riprap in the Bay and shoreline band adjacent to Loch Lomond Marina docks I and J, for shoreline stabilization and protection against erosion. Special Condition II.H.3 (Riprap Placement) was amended to allow for engineered riprap placement at a slope steeper than two to one (2:1) where site constraints limit the ability for a less steep slope so long as a more substantial toe will be constructed to support the steeper slope.
  7. On October 10, 2010, the Commission issued the first amendment to the Permit to authorize an extension to the project commencement time, to October 1, 2015, and completion time to, to October 1, 2018.
  8. On April 13, 2013, BCDC staff received a request for the second amendment to the Permit from a new property owner, MVA, and not San Rafael Marina, LLC, the former owner and Permittee.
  9. On November 18, 2013, the Commission issued the second amendment to the Permit to MVA, which revises the schedule for completing public access requirements contained in the original authorization.
  10. On March 6, 2015, Commission staff received a written request from MVA for inspection of the foundation of the home to be located on Lot 34 of the Village at Loch Lomond Marina, in the shoreline band, pursuant to Special Condition II.H.1 (Foundation Layout Inspection Request) of the Permit.

11. On March 14, 2015, Adrienne Klein, Chief of Enforcement, conducted a site visit and observed that while the home appeared to be placed outside of the required public access area, MVA had placed rock riprap adjacent to and bayward of the Boardwalk, and that some unknown and probably upland activity had caused a roughly 8,280-square-foot mud wave on the edge of the Bay west of the East Spit between Docks E and F, which had smothered an area of tidal marsh habitat of the same size. Ms. Klein further observed that the slope of the riprap appeared to exceed a 2:1 slope, which she believed was not consistent with the requirements of Special Condition II.Q.2 (Riprap Placement) of the Permit, and questioned whether the base of the riprap had been placed in the Bay because of the presence of marsh vegetation at the toe of the slope and growing up through the riprap, in violation of Authorization Section I.A.2.i of the Permit. At this time, Ms. Klein could not determine if the volume of riprap conformed to the Permit's limit of 1,000 cubic yards. Following the site visit, Commission staff's review of the Permit file confirmed that no riprap plan for this location had been submitted or approved, which is a violation of Special Condition II.Q.3.b (Riprap Plan Review) of the Permit and also, that no written certification of contractor review had been submitted prior to commencing any grading, demolition, or construction, a violation of Special Condition II.E (Certification of Contractor Review) of the Permit.

12. On March 20, 2015, Commission staff spoke by telephone with Todd Wright, Project Lead of Real Estate Strategies and Solutions, Inc., the agent for MVA, in order to discuss the pending submittal of public access and engineering plans, as well as the compliance issues discovered six days earlier. During this call Maggie Weber, Enforcement Analyst for the Commission, informed Mr. Wright of the March 14, 2015 site visit and that Commission staff observed the placement of rock riprap bayward of and adjacent to the Boardwalk and that this placement occurred without plan approval. As Special Conditions II.A.2 (Plan Review) and II.Q (Riprap)<sup>1</sup> of the Permit require plan approval prior to the placement of riprap, Ms. Weber advised Mr. Wright to stop work until he had received plan approval. Ms. Weber further advised that if any of the riprap bayward of the Boardwalk is located in the San Francisco Bay, which it appears to be, it is not authorized and MVA must seek after-the-fact authorization to retain it at this location.

13. On April 17, 2015, Ms. Weber sent MVA a letter that:

- A. Memorialized the March 14, 2015 site visit and March 20, 2015 conference call, and also described other compliance issues related to the Permit;
- B. Requested that all work bayward of the Boardwalk stop until either a permit amendment was issued and/or a plan was approved for the riprap placed adjacent to the Boardwalk;
- C. Provided notice that Commission staff had observed the effects of a mud wave on March 14, 2015; and

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<sup>1</sup> The third amendment to the Permit issued on September 2, 2015, changed what was formally Special Condition II.R into what is now Special Condition II.Q. At the time of the March 20, 2015 conference call, Special Condition II.Q (Riprap) was identified as Special Condition II.R.

- D. Requested more information to determine if restoration of the intertidal area impacted by the mud wave was necessary.

14. On May 13, 2015, MVA sent a letter to Ms. Weber responding to the April 17, 2015 letter. The response provided construction plans for the riprap that was placed adjacent to the Boardwalk and an explanation for the mud wave stating it was a soil displacement that occurred on the morning of September 20, 2014 that was caused by “a temporary loading of recycled concrete and asphalt material too close to the Boardwalk”. The letter further explained, “the soil displacement affected an area of approximately 2,775 square feet... and involved approximately 210 cubic yards of material. The grades within 20 feet of the boardwalk have been restored.” Finally, the letter provided the past due Certification of Contractor’s Review submittal.

15. On June 11, 2015, Rafael Montes, the Commission’s Senior Engineer, wrote a letter to MVA that formally provided plan denial for the riprap construction plans that MVA submitted on May 13, 2015 and requested more information in order to approve the plans. In the denial letter, Mr. Montes explained that MVA failed to provide enough information regarding fill quantities and engineering details and the plans appeared to be only conceptual.

16. On July 17, 2015, Ms. Weber and Ms. Klein conducted a site visit with Mr. Wright, who explained that the temporary stockpiling of fill at an area of the construction site located outside of the shoreline band caused the mud wave. Mr. Wright did not tell staff that the mudwave had destroyed the Boardwalk and seawall and that both were repaired without authorization.

Ms. Weber and Ms. Klein observed that the top of the riprap placed Bayward of the Boardwalk was approximately 18 inches higher than the Boardwalk. This observation raised further doubts as to whether the riprap was placed for shoreline protection, in addition to the facts that riprap was already present and there was little to no wave energy at this location due to the presence of marsh vegetation.

During this site visit, Commission staff discovered two more violations of the Permit: the installation of an unauthorized transformer located in the shoreline band (Violation I.V.G.4) as well as unauthorized riprap placed along a portion of Lot D, located on the west shore of the East Spit, which resulted in fill of marsh habitat (Violation IV.D). Again, Commission staff observed the presence of marsh vegetation in the riprap placed adjacent to the Boardwalk consistent with observations made during the March 14, 2015 site visit.

17. On July 23, 2015 Mr. Wright met with Ms. Weber, Ms. Klein, and Mr. Montes of the Commission’s staff at the Commission’s offices to discuss the alleged violations of the Permit and the McAteer-Petris Act. During the meeting, Mr. Wright agreed to submit revised construction plans for the riprap located adjacent to the Boardwalk, per Commission staff’s direction, no later than August 23, 2015. Mr. Wright also agreed to provide justification for the placement of the unauthorized riprap, proving that it is necessary for shoreline protection. Commission staff stated that if the necessary plans were not submitted as discussed,

Commission staff may initiate a more formal enforcement proceeding. Commission staff further advised that if the unauthorized placement of riprap was found to be inconsistent with Section 66605 of the McAteer-Petris Act and the SF Bay Plan, it would have to be removed.

18. On July 29, 2015, Ms. Weber telephoned Paul Jensen, Community Development Director for the City of San Rafael, and learned that the City authorized the riprap placed bayward of the Boardwalk for public safety in lieu of a guardrail because MVA found the raised riprap to be more aesthetically pleasing than a guardrail. Mr. Jensen confirmed that the riprap was not placed for shoreline protection.

19. On August 26, 2015, three days later than agreed upon, Mr. Wright submitted the revised engineering plans for the riprap. The submittal was illustrative and did not provide enough detail for construction, failing to show the toe of the slope, how the rocks would be keyed in place, and the Commission's jurisdiction.

20. On September 2, 2015, the Executive Director issued the third amendment to the Permit to MVA to authorize various activities within the Commission's shoreline band jurisdiction, including the placement of additional riprap along the breakwater (after-the-fact), and the implementation of soil remediation on West Jetty. In addition, various special conditions were modified to clarify timing requirements for required public access improvements and make the permit truly reflect the project under construction.

21. On September 29, 2015, MVA executed the third amendment to the Permit; Commission staff received proof of execution on October 5, 2015.

22. On September 30, 2015, Mr. Montes telephoned Mr. Wright to inform him that Commission staff was planning to deny the riprap plans submitted on August 26, 2015 because they still did not accurately reflect the placement of riprap along the Boardwalk or the location of the Commission's Bay and shoreline band jurisdictions. Mr. Wright called Ms. Weber for confirmation of Mr. Montes' statements, which she provided.

Ms. Weber also stated that based on the plans he had submitted and the record, it appeared that riprap had been placed in the Bay, beyond the scope of the Permit's authorization and therefore, it was likely that the riprap would have to be removed. Ms. Weber provided the option to apply for an amendment to the Permit to request permission to retain the riprap located in the Bay after-the-fact, however, Ms. Weber also disclosed that it would be unlikely that it could be authorized under the McAteer-Petris Act because the riprap serves as an aesthetic border between the Boardwalk and the Bay and not for shoreline protection.

Mr. Wright requested a meeting with Ms. Weber, Ms. Klein, and Mr. Montes before staff officially denied the construction plans and ordered removal of the riprap; Ms. Weber agreed to meet. Mr. Wright also claimed that Ellen Miramontes, Commission's Bay Design Analyst, verbally approved the construction plans for the riprap; Ms. Weber consulted with Ms. Miramontes who said this was not accurate, that she never approved any plans for riprap and deferred such a decision to Mr. Montes.

23. On October 20, 2015, Mr. Wright met with Ms. Weber, Ms. Klein, Mr. Montes, and Brad McCrea, the Commission's Regulatory Program Director, at the Commission's office. Three items were discussed:

- a. **Riprap placed in Bay.** Commission staff informed Mr. Wright that staff will interpret the placement of riprap along the Boardwalk to be in the shoreline band so long as the toe of the slope does not extend further bayward than the former toe of the slope, which was authorized after-the-fact by the 2000 Minor Permit. However, since the riprap was placed without an approved engineered construction plan, nor at a 2:1 slope, both of which are requirements of the Permit, there needs to be some resolution to these violations. Commission staff proposed three options: (i) remove the riprap and rebuild upon receiving plan approval; (ii) request a Permit amendment to add a special condition, which would require the annual removal of any riprap that has fallen into the Bay passed a set horizontal control point, which would be enforced by a settlement agreement that has a future penalty for failure to undertake and report annual monitoring activities; or (iii) issue a cease and desist order.

Mr. Wright stated that he thought adding the maintenance special condition reinforced by a settlement agreement was a viable solution to this violation.

- b. **Mudwave.** Commission staff informed Mr. Wright that MVA will need to obtain retroactive approval for the unauthorized boardwalk, seawall and riprap work undertaken to repair the area damaged by the mudwave and pay an administrative civil penalty for the mud wave due to the nature of this violation and that staff believe the impacted area of marsh habitat would revegetate on its own.

In response, Mr. Wright disclosed to Commission staff that the temporary stockpiling that caused the mud wave had been located in the Commission's shoreline band jurisdiction, in contrast with what Mr. Wright told staff on the July 17, 2015 site visit, that the unauthorized stockpiling occurred out of the Commission's jurisdiction. Mr. Wright further disclosed that the stockpiling had destabilized the site causing the seawall, boardwalk, and riprap located between Docks E and F to collapse and shift 14 feet to the south, surcharge of mud into the Bay, referred to as the mud wave. Additionally, Mr. Wright explained, in September 2014, MVA repaired the seawall, Boardwalk, and riprap without contacting Commission staff or applying for an emergency permit, thereby conducting unauthorized work in the Bay and shoreline band in violation of the Commission's laws, policies, and Special Condition II.A (Specific Plans and Plan Review) of the Permit. Mr. Wright showed Commission staff photographic evidence of this unauthorized development.

- c. **Unauthorized Riprap located on Lot D.** Commission staff informed Mr. Wright that MVA must seek after-the-fact approval for the unauthorized riprap or, if it could not be found consistent with the McAteer-Petris Act and the SF Bay Plan, remove it and possibly conduct habitat restoration.

Mr. Wright stated that there is an erosion issue with Lot D and that MVA would request an amendment to seek after-the-fact approval for the unauthorized riprap.

The October 20, 2015 meeting closed with the agreement and understanding that Commission staff would provide MVA with a proposed settlement agreement in the next month to resolve the enforcement case.

24. On October 31, 2015, 31 days after amendment three to the Permit was executed, MVA became in violation of Special Condition II.P (Recording) for its failure to record the amended Permit on all parcels affected by the amended Permit with Marin County within 30 days after execution of the amended Permit. As of the date of this Violation Report, Commission staff has not received proof that Permit Amendment No. Three was recorded.

25. On November 20, 2015, Commission staff sent MVA a letter that summarized the violations of the Permit and McAteer-Petris Act associated with the development and included proposed resolutions with a proposed settlement agreement attached. The proposed settlement agreement included terms consistent with what was discussed during an October 20, 2015 meeting between Todd Wright, agent of MVA and Commission staff. The cover letter requested that MVA submit comments on the proposed settlement agreement and other requested information by no later than December 31, 2015. On November 25, 2015, Commission staff received confirmation from Mr. Wright, on behalf of MVA, that the proposed settlement agreement was received. Commission staff received no further response from MVA.

26. On December 17, 2015, Mr. Montes sent MVA a letter denying the riprap plans that were submitted to Commission staff on August 24, 2015. The gap in time reflects staff's failed attempt to secure riprap plans that it could approve.

27. On January 7, 2016, after the December 31, 2015 deadline had passed with no submittal of an amendment request, no comments on the proposed settlement agreement, nor a riprap survey, Ms. Weber emailed Mr. Wright stating in the absence of any effort to resolve this matter through the proposed settlement agreement, BCDC intends to prepare a complaint for administrative penalties as well as a cease and desist order to compel removal of unauthorized fill and resolution of all violations. This communication was also sent to John Arvin, Project Manager of MVA.

28. On February 24, 2016, Ms. Weber and Ethan Lavine, Commission Permit Analyst, conducted a site visit and discovered several more violations of Special Condition II.A.3 (Conformity with Final Approved Plans) of the Permit and the Section 66632(a) of the McAteer-Petris Act. These violations include:

- A. The unauthorized placement of riprap in the Bay and shoreline band located east adjacent to the East Spit that had gone unnoticed on the July 17, 2015 site visit;
- B. The unauthorized placement of electrical posts and associated electrical wiring in the Bay and shoreline band located adjacent to the Boardwalk that was not present during the July 17, 2015 site visit;
- C. The unauthorized placement of a transformer in the shoreline band located on the landward end of the East Spit that had gone unnoticed on the July 17, 2015 site visit;
- D. The unauthorized placement of a "T shaped" metal pole in the shoreline band located on the landward end of the East Spit that had gone unnoticed on the July 17, 2015 site visit;
- E. The unauthorized placement of a storage locker in the shoreline band located on the landward end of the East Spit that had gone unnoticed on the July 17, 2015 site visit; and
- F. The unauthorized placement of electrical equipment in the shoreline band located at the southeast angle bayward of the east parking lot adjacent to the start of the breakwater trail that had gone unnoticed on the July 17, 2015 site visit.

29. On April 28, 2016, Ellen Miramontes, BCDC Bay Design Analyst, spoke with Paul Jensen, City of San Rafael Community Development Director, who was concerned that the area of the required public access located in between the east parking area and the head of breakwater trail, and adjacent to the wetland mitigation site, is periodically inundated by tidal flooding and, therefore, is not safe for, nor available for use by, the public as required by the BCDC Permit. Mr. Jensen expressed a desire to work with BCDC staff to resolve this issue.

30. On May 20, 2016, the Executive Director commenced a formal enforcement proceeding by issuing a Violation Report and Complaint for the Imposition of Administrative Civil Penalties. The Original Violation Report identified 19 alleged violations of the Permit:

- A. The placement of riprap adjacent to the Boardwalk:
  - (1) In the Bay, in violation of Authorization Section I.A.2.i, which only authorizes the placement of riprap in the shoreline band, of the.
  - (2) At a slope steeper than the authorized 2:1 grade that was not engineered in violation of Special Condition II.Q.2, Riprap Placement, of the Permit
  - (3) Without plan approval in violation of Special Condition II.Q.3.b, Riprap Plan Review, of the Permit.
- B. The unauthorized stockpiling of construction materials in the shoreline band located between Docks E and F that caused a mudwave that resulted in unauthorized fill in violation of Section 66632(a) of the McAtteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit. The mudwave's dimension observed by staff is roughly 8,280 square feet.

- C. The unauthorized work in the Bay and shoreline band to repair the seawall, Boardwalk, and riprap destroyed by the mudwave, located between Docks E and F in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit. The dimension of the repaired area of bay and shoreline band is roughly 12,650 square feet.
- D. The unauthorized placement of riprap in the Bay and shoreline band at Lot D, located on the East Spit in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit.
- E. The unauthorized placement of riprap in the Bay and shoreline band located east adjacent to the East Spit in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit.
- F. The unauthorized placement of electrical posts and associated electrical wiring in the Bay and shoreline band located adjacent to the Boardwalk in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit.
- G. The unauthorized placement of the following utilities in the dedicated public access area located in the shoreline band in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit:
  - (1) A transformer located on the landward end of the East Spit;
  - (2) A "T shaped" metal pole located on the landward end of the East Spit;
  - (3) A storage locker located on the landward end of the East Spit;
  - (4) A transformer located at the southeast angle bayward of the east parking lot adjacent to the start of the breakwater trail; and
  - (5) Electrical equipment located at the southeast angle bayward of the east parking lot adjacent to the start of the breakwater trail.
- H. Failure to submit to the Executive Director, gain staff approval of, and record, an instrument that dedicates the required public access area to the public by March 31, 2016, in violation of Special Condition II.B.2, Public Access Permanent Guarantee, of the Permit.
- I. Failure to submit to the Executive Director and gain staff approval of an instrument that dedicates the required view corridors by March 31, 2016, in violation of Special Condition II.C.2, Permanent Guarantee of View Corridors, of the Permit.
- J. Failure to submit written certification of contractor review prior to commencing any grading, demolition, or construction, in violation of Special Condition II.E, Certification of Contractor Review, of the Permit (Resolved, May 13, 2015).



- K. Failure to twice notify Commission of transfer of interest in property subject to Permit: the first time occurred after the issuance of the first amendment but prior to the second, and the second time occurred on March 25, 2016 when MVA transferred a portion of the Property to Mr. and Mrs. Tankoos, both in violation of Special Condition II.O.2, Assignment, of the Permit.
- L. Failure to record the amended Permit on all parcels affected by amended Permit with Marin County within 30 days after execution of amended Permit, in violation of Special Condition II.P, Recording, of the Permit (Resolved, April 14, 2016).

31. On June 6, 2016, BCDC staff received confirmation from John Arvin, Project Manager of MVA, that he had received the May 20<sup>th</sup> Violation Report.

32. On June 10, 2016, Mr. Arvin, Mr. Jensen, Mr. Zeppetello, BCDC Chief Counsel, and Ms. Weber, BCDC Enforcement Analyst, met onsite to discuss the alleged violations and road to resolution of the violations.

33. On June 12, 2016, Mr. Arvin provided BCDC staff with legal descriptions for the Public Access Permanent Guarantee (Violation IV.H in the Original Violation Report) and the View Corridor Permanent Guarantee (Violation IV.I in the Original Violation Report).

34. On June 15, 2016, Mr. Zeppetello responded Mr. Arvin's incomplete submittal with comments on how to fully comply with the Public Access Permanent Guarantee and the View Corridor Permanent Guarantee violations (Violations IV.H and .I in the Original Violation Report).

35. On June 21, 2016, Mr. Jensen met with a group of residents concerned about the frequent flooding of the public access path between the terminus of the marina parking lot and the breakwater (Exhibit # 5 of the Original Violation Report).

36. On June 23, 2016, MVA's retained attorney, Jim Burroughs of Allen Matkins Leck Gamble Mallory and Natsis LLP, requested an extension of time to complete the statement of defense, originally due on June 24, 2016, and also waived MVA's right to a hearing on the enforcement proceeding within 60 days of receipt of the Original Violation Report. Mr. Zeppetello granted an extension of time for the statement of defense to be submitted on July 22, 2016.

37. On July 14, 2016, Mr. Burroughs and MVA co-counsel Jordan Flanders met with Ms. Weber, Mr. Zeppetello, and Adrienne Klein, Chief of Enforcement, BCDC staff members to discuss the violations and the possibility of settlement. Following the meetings, Ms. Flanders requested a second extension of the deadline to submit a statement of defense; Mr. Zeppetello granted an extension of time for the statement of defense to be submitted on August 5, 2016.

38. On July 27, 2016, Ms. Weber, Ms. Flanders, and Mr. Jensen met on site to discuss the flooding of a section of the public access area and to check whether the public access areas and improvements that were due as of March 1 and 31, 2016, respectively, had been constructed and made available to the public.

**Public Access Maintenance.** Staff observed that the tidal flooding has left resting water in the public access area located in between the east parking area and the head of the breakwater trail and adjacent to the wetland mitigation site, which is a violation of Special Condition II.B.9, Public Access Maintenance, which requires repairs to any public access areas damaged by flooding (See Exhibit #24, Violation II.Q). The standing water adversely impacts the public access by create potholes, erosion of the pathway surface, and unseasonably muddy conditions; and

**Late Public Access Improvements.** Ms. Weber observed:

- That the park on the East Spit and its improvements, consisting of a picnic area, benches, a children's playground, a public restroom and a trail, while apparently constructed, is blocked from use by a chain link fence along the park's northern boundary;
- The absence of the fishing pole holder at the eastern end of the marina;
- The absence of striping to establish the path at the southwest corner of the site creating a new connection between the public access on the West Spit at Loch Lomond Marina and the public access at San Pedro Cove; and
- The presence of unauthorized riprap in the shoreline band, some of which may also be located in the Bay, at the northeastern edge of the East Spit, apparently to protect the unauthorized concrete pad and storage locker.

39. On July 29, 2016, Ms. Flanders requested a third extension to the deadline to submit a statement of defense; Mr. Zeppetello granted an extension of time for the statement of defense to be submitted on August 19, 2016.

40. On August 1, 2016, Ms. Weber reviewed the plan entitled "Village at Loch Lomond Layout Plan, L-2.3," by Guzzardo Partnership, dated August 20, 2014, and approved by BCDC staff on April 13, 2015, and confirmed that the concrete pad, described in modified Violation IV.G.3 (of the Original Violation Report), is not authorized by the permit nor shown on the plans. At this location, the approved site plans show vegetation and do not show paving bayward of the adjacent paved parking spaces.

41. On August 3, 2016, Ms. Weber reviewed the plan entitled "Loch Lomond Marina, Wetland Mitigation Project Grading Plan, Sheet M-2," by WRA Environmental Consultants, dated September 14, 2009, received March 26, 2016, approved by BCDC staff on April 13, 2015, and determined that 5 feet NAVD88 is the highest elevation of the land where the section of public shore trail subject to flooding is located.

Ms. Weber consulted the FEMA SF Bay Tidal Datum data for Point ID 73, located adjacent to the mouth of Loch Lomond Marina, and determined that the mean high water ("MHW") is 5.53 feet NAVD88, the mean higher high water ("MHHW") is 6.08 feet NAVD88, the 1 year extreme tide is 7.31 feet NAVD88, and the 100 year extreme tide is 9.49 feet NAVD88.

Ms. Weber reviewed NOAA's tide predictions for Point San Pedro, Ca (Station ID: 9415009) for the months of January through August 2016, and observed that the majority of the daily low high and high high tides rise above five (5) feet NAVD88.

Based on this information, it is evident that the public access area, located adjacent to the wetland mitigation site, regularly floods and will continue to cause maintenance issues unless some corrective action is taken.

42. On August 15, 2016, the Executive Director issued a Supplemental Violation Report and Complaint for the Imposition of Administrative Civil Penalties. The purpose of the Supplemental Violation Report eliminates Loni and Ryan Tankoos as named parties, eliminates two of the original violations, modifies the scope of one of the other violations alleged in the Original Violation Report, and provides notice of seven additional violations that have occurred, or that staff became aware of, since May 20, 2016:

- **Eliminates Violation IV.E**, addressed in the Original Violation Report, from this enforcement proceeding because, after further investigation, staff determined that the placement of riprap located east of the East Spit is authorized by BCDC Permit No. M2000.05.04, originally issued to Loch Lomond Marina, LLC on April 17, 2001, as amended.
- **Eliminates Violation IV.K**, addressed in the Original Violation Report, from this enforcement proceeding because, after further investigation, staff determined that: (1) the issuance of the second amendment to MVA effectively assigned the Permit from Loch Lomond Marina, LLC to MVA; and (2) Loni and Ryan Tankoos do not control property subject to this enforcement action.
- **Modifies** Violation IV.G.3, addressed in the Original Violation Report, as noted:  
 IV.G.3 The unauthorized placement of the following utilities in the dedicated public access area located in the shoreline band in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit:
  3. A storage locker and unauthorized concrete foundation pad upon which the storage locker sits, at the eastern landward edge of the East Spit, which extends beyond the built edge of the spit and may be located in the Bay located on the landward end of the East Spit;
- **Adds** the following new violations:
  - M. The failure to provide and make available for public access use by March 31, 2016:
    1. A 340-foot-long, 57-foot-wide park, picnic area, benches, children's playground, and a five-foot-wide, 400-foot-long decomposed granite trail on the East Spit;
    2. A public restroom at the entrance of the East Spit; and

3. A fishing pole holder at the eastern end of the marina,  
All in violation of Special Condition II.B.5.g, .h, and .k, The Backbone, of the Permit. These violations were confirmed by BCDC staff on July 27, 2016, during a site visit with Jordan Flanders, counsel to MVA, and Paul Jensen, City of San Rafael.
- N. The failure to provide and make available for public access use, a striped pathway on existing asphalt to connect the park located on the West Spit to the existing public access located on the adjacent property prior to March 1, 2016, in violation of Special Condition II.B.11.a, Future Public Access Connections to Neighboring Parcel, of the Permit. This violation was confirmed by BCDC staff on July 27, 2016, during a site visit with Jordan Flanders, counsel to MVA, and Paul Jensen, City of San Rafael.
- O. The failure include certain required information and assurances in CC&Rs for any membership association intended to have responsibility to maintain public access and view corridor improvements on or before March 25, 2016 when the sale of the first residential unit occurred, in violation of Special Condition II.O.4, Property Owners Association, of the Permit. This violation was confirmed by BCDC staff on June 10, 2016, during a site visit with John Arvin, MVA, and Paul Jensen, City of San Rafael.
- P. The unauthorized placement of riprap possibly in the Bay and in the shoreline band at the northeastern edge of the East Spit, adjacent to the unauthorized storage locker located on the landward end of the east spit<sup>2</sup> in violation of Section 66632(a) of the McAteer-Petris Act and Special Condition II.A.3, Conformity with Final Approved Plans, of the Permit. This violation was discovered by BCDC staff on July 27, 2016, during a site visit with Jordan Flanders, counsel to MVA, and Paul Jensen, City of San Rafael.
- Q. The failure to maintain from flooding, the public access area located in between the east parking area and the head of the breakwater trail, adjacent to the wetland mitigation site, in violation of Special Condition II.B.9, Public Access Maintenance. This violation was confirmed by BCDC staff on July 27, 2016, during a site visit with Jordan Flanders, counsel to MVA, and Paul Jensen, City of San Rafael.

44. Government Code Section 66641.5(e) provides that the Commission may administratively impose civil liability for any violation of the Permit in an amount of which shall not be less than \$10 nor more than \$2,000 for each day in which the violation occurs or persists, but may not administratively impose a penalty of more than \$30,000 for a single violation. In the Supplemental Violation Report, the Commission staff proposed a total penalty of \$563,500.

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<sup>2</sup> Cited as Violation IV.G.3 in the Original Violation Report.